



## U.S. Department of Justice

Executive Office for Immigration Review

*Office of the General Counsel*

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5107 Leesburg Pike, Suite 1903  
Falls Church, Virginia 22041

November 30, 2018

MuckRock News  
DEPT MR 61720  
411A Highland Ave  
Somerville, MA 02144-2516

Re: FOIA 2018-51805

Dear Mr. Edelman,

This letter is in response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) in which you seek documents regarding agency guidance to immigration judges about whether and when to permit an attorney to appear via telephone.

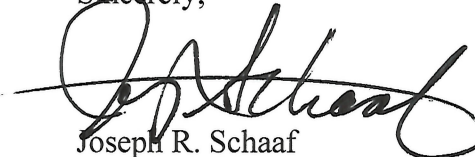
The agency guidance is found in the Immigration Practice Manual at sections 4.6 and 4.7 (enclosed). Additionally, upon search we discovered an e-mail string containing guidance from Assistant Chief Immigration Judge Mart to the Memphis Immigration Court. Portions of the e-mail string were redacted pursuant to 5 USC § 552(b)(6) to prevent an unwarranted invasion of personal privacy. There will be no charge for these documents.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* <http://www.justice.gov/oip/foiapost/2012foiapost9.html>.

You may contact our FOIA Public Liaison at the telephone number 703-605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "J. Schaaf", with a large, stylized flourish extending from the end of the signature.

Joseph R. Schaaf

Chief Counsel for Administrative Law

**(d) *Withdrawal or substitution.*** — Withdrawal of counsel can be requested by oral or written motion. See Chapter 2.3(i)(ii) (Withdrawal of counsel). Substitution of counsel also can be requested by oral or written motion. See Chapter 2.3(i)(i) (Substitution of counsel).

#### 4.5 Hearing and Filing Location

There are more than 200 Immigration Judges in over 50 Immigration Courts nationwide. The hearing location is identified on the Notice to Appear (Form I-862) or hearing notice. See Chapter 4.15(c) (Notification). Parties should note that documents are not necessarily filed at the location where the hearing is held. For information on hearing and filing locations, see Chapter 3.1(a) (Filing). If in doubt as to where to file documents, parties should contact the Immigration Court.

#### 4.6 Form of the Proceedings

An Immigration Judge may conduct removal hearings:

- in person
- by video conference
- by telephone conference, except that evidentiary hearings on the merits may only be held by telephone if the respondent consents after being notified of the right to proceed in person or by video conference

See INA § 240(b)(2), 8 C.F.R. § 1003.25(c). See also Chapter 4.7 (Hearings by Video or Telephone Conference).

Upon the request of the respondent or the respondent's representative, the Immigration Judge has the authority to waive the appearance of the respondent and/or the respondent's representative at specific hearings in removal proceedings. See 8 C.F.R. § 1003.25(a). See also Chapter 4.15(m) (Waivers of appearances).

#### 4.7 Hearings by Video or Telephone Conference

**(a) *In general.*** — Immigration Judges are authorized by statute to hold hearings by video conference and telephone conference, except that evidentiary hearings on the

merits may only be conducted by telephone conference if the respondent consents after being notified of the right to proceed in person or through video conference. See INA § 240(b)(2), 8 C.F.R. § 1003.25(c). See also Chapter 4.6 (Form of the Proceedings).

**(b) Location of parties.** — Where hearings are conducted by video or telephone conference, the Immigration Judge, the respondent, the DHS attorney, and the witnesses need not necessarily be present together in the same location.

**(c) Procedure.** — Hearings held by video or telephone conference are conducted under the same rules as hearings held in person.

**(d) Filing.** — For hearings conducted by video or telephone conference, documents are filed at the Immigration Court having administrative control over the Record of Proceedings. See Chapter 3.1(a) (Filing). The locations from which the parties participate may be different from the location of the Immigration Court where the documents are filed. If in doubt as to where to file documents, parties should contact the Immigration Court.

In hearings held by video or telephone conference, Immigration Judges often allow documents to be faxed between the parties and the Immigration Judge. Accordingly, all documents should be single-sided. Parties should not attach staples to documents that may need to be faxed during the hearing.

**(e) More information.** — Parties should contact the Immigration Court with any questions concerning an upcoming hearing by video or telephone conference.

## 4.8 Attendance

Immigration Court hearings proceed promptly on the date and time that the hearing is scheduled. Any delay in the respondent's appearance at a master calendar or individual calendar hearing may result in the hearing being held "in absentia" (in the respondent's absence). See 8 C.F.R. § 1003.26. See also Chapters 4.15 (Master Calendar Hearing), 4.16 (Individual Calendar Hearing), 4.17 (In Absentia Hearing).

Any delay in the appearance of either party's representative without satisfactory notice and explanation to the Immigration Court may, in the discretion of the Immigration Judge, result in the hearing being held in the representative's absence.

Respondents, representatives, and witnesses should be mindful that they may encounter delays in going through the mandatory security screening at the Immigration

**From:** [Davis, J.Thomas \(EOIR\)](#)  
**To:** [Schaaf, Joseph R. \(EOIR\)](#)  
**Subject:** FW: Telephonic Hearings  
**Date:** Tuesday, November 27, 2018 3:25:22 PM

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**From:** Mart, H. Kevin (EOIR)  
**Sent:** Tuesday, September 25, 2018 2:31 PM  
**To:** Davis, J.Thomas (EOIR) <Thomas.Davis@EOIR.USDOJ.GOV>  
**Subject:** RE: Telephonic Hearings

Whether a judge allows a telephonic hearing is left to the judge's discretion. The regs say that an IJ may conduct telephonic hearings. There is no mandatory language. Also the CA does not get involved with an IJs rulings on motions. Each motion is decided upon by the IJ handling that case.

**From:** Davis, J.Thomas (EOIR)  
**Sent:** Tuesday, September 25, 2018 2:51 PM  
**To:** Mart, H. Kevin (EOIR) <[H.Kevin.Mart@EOIR.USDOJ.GOV](mailto:H.Kevin.Mart@EOIR.USDOJ.GOV)>  
**Subject:** Telephonic Hearings

Judge Mart,

Good afternoon. Below is an e-mail shared with me by (b) (6), local AILA liaison. This type of reaction was expected, but just making you aware of the matter. As we all discussed most Immigration Courts do not conduct telephonic hearings. The firms will simply have to make a business decision.

Take care.

Tom

Dear (b) (6)

I hope this email finds you well. I am reaching out to you, as the AILA EOIR Liaison, regarding Judge Holt's and Judge Miles' recent change in policy regarding telephonic appearance for master calendar hearings. It seems that these judges are now routinely denying motions for these hearings. As of this morning, I received orders from both judges denying our firm's motion for telephonic appearance because there are no "extraordinary circumstances" present.

Our attorneys, (b) (6) and I, all live and practice in Little Rock, Arkansas. The trip to Memphis takes us anywhere from 2 ½ - 3 hours **each way** on average, and can take even longer if there are accidents, construction, or bad weather. That means that we lose almost an entire day of work to travel each time we have to travel to Memphis. We generally have master calendar hearings before the Memphis Immigration Court 2-4 days/week. It's simply not feasible for a firm of our size to lose an attorney that many days/week for such short (3-5 minute), routine hearings. If our attorneys can't appear telephonically at master calendar hearings, the reality is that we will not be able to represent respondents before these judges. Our clients are already on payment plans and can't afford for us to increase our fees to cover additional travel time or to pay a



local Memphis attorney to cover a master calendar hearing. Our firm isn't comfortable or willing to take on the increased liability of having one of our attorneys driving to and from Memphis on an almost daily basis, or the increased liability of having a local Memphis attorney who isn't familiar with a case cover a master calendar hearing. These circumstances have existed as long as we have practiced before the Memphis Immigration Court, and our motions for telephonic appearances have always been granted. Although at first blush the judges may not consider our distance from/travel time to the Court an "extraordinary circumstance," it is sufficiently extraordinary as to significantly impede our ability to take cases before the Memphis Immigration Court.

I know that other members of the private bar are in the same/similar situation, and I think the result will be that fewer attorneys will represent respondents before the Memphis Immigration Court, which will in turn result in more pro se respondents before the Court. Without any explanation from the judges as to why they've started denying telephonic appearances, I can only assume that the underlying rationale is that telephonic hearings are taking too long because judges have to get the attorneys on the phone. I can only speak for our firm when I say that we are always at our desk waiting and ready for the judge's call. (In all my years practicing before the Court, I can recall only one time that Judge Holt called me and I was in the restroom) From what I've seen in the Court and heard from other attorneys and judges, hearings with pro se respondents generally take longer than hearings in which the respondents are represented by counsel. So, if the judges are trying to be efficient with their time in order to complete their master calendar dockets, an increase in pro se respondents will likely have the opposite effect.

I hope that you are able to discuss this matter with Tom Davis so that there can hopefully be a quick resolution to the matter. In the meantime, our office is making the necessary arrangements for pending cases and taking this new policy into consideration when accepting new cases. I hope to hear from you soon.

Thanks,

(b)

[REDACTED]

J. Thomas Davis  
Court Administrator  
USDOJ/EOIR/Immigration Court  
80 Monroe Ave, Suite 501  
Memphis, TN 38103